United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1001

To be argued by
EDWARD GASTHALTER

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1001

UNITED STATES OF AMERICA,

Appellee,

—v.—

WONG CHOU SHEK,

Appellant.

ON AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT, WONG CHOU SHEK

GASTHALTER & POLLOK
Attorneys for the Appellant
Wong Chou Shek
233 Broadway
New York, New York 10007
(212) 964-6226

Of Counsel:
EDWARD GASTHALTER

UNITED STATES COURT OF APPEALS
FILED
MAR 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

PAGE

Statement of Issues Presented for Review 1

Statement of Facts

1. Introduction: A Brief Overview 2

2. Conspiracy #1 - Mainland Asia to the United States 4

3. Conspiracy #2 - Mainland Asia to Canada 11

ARGUMENT:

POINT I - Inasmuch as the trial proof indicated two distinct and independent conspiracies, the error of prejudicial variance was committed and a new trial is required 14

POINT II - The trial court erred by not granting appellant's motions for a severance and mistrial 20

POINT III - The trial court erred in admitting Government's Exhibit 44 into evidence 29

POINT IV - The appellant, Wong Chou Shek, respectfully adopts all points advanced by his co-appellants insofar as these points are applicable to him. 35

CONCLUSION 35

TABLE OF CASES

PAGE

Berger v. United States, 295 U.S. 78 (1935) 17

Bruton v. United States, 391 U.S. 123 (1968) 28

Delli Paoli v. United States, 352 U.S. 232 (1956). 28

Kotteakos v. United States, 328 U.S. 750 (1946) .. 17

Krulewich v. United States, 336 U.S. 440 (1948) .. 29

United States v. Barrow, 363 F. 2d 62 (3rd Cir., 1966); cert. den. 385 U.S. 1001 (1967) 34

United States v. Bertolotti, et. al., ___ F. 2d ___, slip op. #6409 et sec., Nov. 10, 1975 .. 18, 19

United States v. Sperling, 506 F. 2d 1323 (2nd Cir., 1974); cert. den. 420 U.S. 962 (1975) 18

Weinstein's Evidence, Vol. 4, p. 803-130 (1975) .. 34

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1001

UNITED STATES OF AMERICA,

Appellee,

-v.-

WONG CHOU SHEK,

Appellant.

BRIEF OF APPELLANT, WONG CHOU SHEK

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Inasmuch as the trial proof indicated two distinct and independent conspiracies, was the error of prejudicial variance committed by the trial court so as to require a new trial?

2. Did the trial court err by failing to grant appellant's motions for a severance and mistrial?

3. Did the trial court err in admitting Government's Exhibit 44 into evidence?

STATEMENT OF FACTS*

1. Introduction: A Brief Overview.

This is an appeal from the final judgment of the United States District Court for the Southern District of New York (Ward, J.), entered on December 16, 1975, after a jury trial convicting the defendant-appellant, Wong Chou Shek (hereafter "the appellant"), of conspiring to distribute and possess with intent to distribute narcotics in violation of sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21 United States Code. The appellant was not charged with any substantive violations of the narcotics law. The appellant was sentenced to a term of imprisonment of five years followed by a special parole term of three years. He is presently incarcerated (A. 10).**

---

* The reproduced joint appendix of the appellants is cited infra, using the prefix "A". Reference to the trial transcript bears the prefix "R". Government exhibits are referred to as "GX".

** The appellant was tried together with three others, Ernst Olsen, Victor Leong and Louie Yui Che. The first two were convicted of conspiracy, as well as substantive violations of the narcotics law. The defendant Louie Yui Che was acquitted of all charges.

The indictment consisted of some sixteen counts and named as defendants twenty-six individuals. The conspiracy count contained seventy-nine overt acts and spanned a time period from May 1, 1971 to March 5, 1975, during which time it was alleged that thirteen separate shipments of narcotics were made from the Asian mainland to the United States and Canada (R. 2128-2299). The indictment charged and the proof at trial indicated that the defendants at trial, in various combinations, allegedly participated and/or conspired to participate, in illicit transactions in Bangkok, Thailand, Vancouver, Toronto and Montreal, Canada, New York, New York, San Francisco, California, Hong Kong, Japan and Taiwan involving primarily heroin, but also opium and morphine. The trial took in excess of three weeks and was concededly convoluted and complex (R. 2127). The Government contended that the defendants named in the indictment constituted "an international conspiracy to smuggle huge quantities of pure heroin into North America" (R. 2127). Contrary to the contention of the Government that all defendants were members of a single unified conspiracy, as will be shown more fully below, the proof disclosed at least two separate, independent, unrelated conspiracies merely merged together for the sake of convenience to the Government and patently designed to result in maximum prejudice to the individuals on trial.

Conspiracy #1 - Mainland Asia to the United States.

The Government charged in the indictment and elicited proof at trial that the ultimate suppliers of the narcotics were the co-conspirators Ma Ssu Ts' Ung (a/k/a "Ma"), his nephew, Tony Ma and their associate Anake, all of whom had been arrested on the Asian mainland prior to trial (R. 512).*

More particularly, the proof indicated that the alleged conspiracy began forming in Spring of 1971 when Sze Chun Kam (a/k/a "Charley Sze") met Wong Shing Kong (a/k/a Stanley Wong, hereafter "Wong Shing") while they were shipmates.** Wong Shing informed Charley Sze that he had been shipping heroin to the United States. Charley Sze responded that he had a "friend who is in the business" and that the two should meet (R. 2031). Charley Sze introduced Wong Shing to Ma and his nephew, Tony Ma, at Ma's jewelry store in Bangkok.

---

*The indictment bore sub-headings indicating the designated role which the Government alleged each defendant played. Thus, for example, Ma, Tony Ma and Anake were described as "the source of supply". The trial Court ruled the sub-headings would be excluded (R. 2295). The Government was, however, permitted over objection of the defense to use a chart setting forth the "framework" of the Government's case (R. 55, 2128).

** Both Charley Sze and Wong Shing testified for the Government.

Getting down to basics without any delay, Wong shing indicated that he had been successful in shipping heroin into the United States by utilizing Danish seamen aboard ships traveling between Bangkok and New York (R. 126, 2033). Wong Shing further indicated that he was able to obtain $4,000 for approximately 1½ pounds of heroin (one unit) in the United States and that a typical shipment included 20 units of heroin and 100 pounds of opium. Ma readily assented to supply his needs.

Having obtained a supplier, Wong Shing set out to locate seamen willing to serve as couriers (R. 128). After unsuccessfully attempting to load 22½ pounds of heroin and 100 pounds of opium aboard the ship, Clifford Maersk, Wong Shing went to the Bangkok waterfront to meet the defendant Ernst Olsen with whom he had previously sailed (R. 128, 154-155). Wong Shing informed Olsen of his arrangements and introduced him to Ma. Thereafter, Olsen took possession of the narcotics packed in two trunks until a ship and seamen could be found to transport it to the United States (R. 160-164).

Olsen was unable to make contact with a ship in Bangkok and flew to Japan. While in Japan, Wong Shing came upon the idea of transporting narcotics in false-sided suitcases -- an idea readily assented to by Ma (R. 166-168). He immediately telephoned Olsen and ordered him to fly back to Bangkok. Upon his return in August, Olsen retrieved the heroin and opium from the two trunks in which it had been packed and re-packed the narcotics into four false-sided trunks which Olsen proceeded to take with him by plane to New York City (R. 204). This was the first alleged shipment of narcotics from mainland Asia to New York.

In August, while Olsen was en route to New York City, Wong Shing called Lam Kin Sang (hereafter "Lam") who was living there.* Wong Shing and Lam had previously been shipmates (R. 200-201). Wong Shing advised Lam to expect the arrival of Olsen and described the latter. Shortly thereafter, Olsen met Lam and delivered the 15 uni s of heroin packed in the false-sided suitcases. This marked the arrival of what the Government alleged was the first of many shipments to America from mainland Asia and established the Bangkok to New York connection -- a connection which the Government alleged spread its tentacles from New York to San Francisco (R. 2144).

---

* Lam testified as a Government witness.

The suitcases were taken to Lam's house in Flushing and re-packed into one pound bags. Lam then started to sell the heroin in New York City (R. 749-750). The first person he approached was Lee Louie.* Shortly thereafter, Lee Louie brought one pound of heroin from Lam for $4,000 and Lam gave the money to Olsen (R. 754). Olsen then left New York en route to Bangkok (R. 755).

Thereafter, Lam met Victor Leong (a/k/a "Fatty Choy") at the Tung On gambling house in New York City (R. 759). Leong asked Lam for ½ pound of heroin and agreed to pay Lam $2,000 for it when he, Leong, had in turn,sold it (R. 760).

In September, Lam and Leong left New York for San Francisco (R. 762). The Government conceded that while in San Francisco with Lam, Leong did nothing with Lam relating to narcotic transactions (R. 2136). Lam had with him 4 pounds of heroin (R. 763).

In San Francisco Lam called the appellant, Wong Chou Shek, at the Dai Loy gambling house (R. 765). Lam informed the appellant that he had some heroin with him and asked him if the appellant could make some sales for him (R. 766). The appellant, in turn, told Lam he had never sold before but he would introduce Lam to his friend Pon You Wing (a/k/a "Ah Fu", hereafter "Pon").**

---

* Lee Louie was not tried herein.

** Pon testified as a Government witness.

Pon testified that in October he agreed to work for the appellant as a heroin courier and met with Lam and the appellant almost every day (R. 1334). Shortly thereafter, Lam returned to New York Pon was thereafter to make the first of many trips from San Francisco to New York to obtain heroin for the appellant from Lam and to deliver it to the appellant and the appellant's customers (R. 2134, 2139, 2142). It was agreed that for each pound of heroin he carried he was to be paid the sum of $500 (R. 1336). Thereafter, Pon delivered heroin for the appellant to, among others, Louie Yiu Che, a/k/a Louie Gin, Dong Wong and George Kay Lew. Ultimately, Pon was to sell to an undercover policewoman and get arrested (R. 1421).

Meanwhile, in New York, Lam, on his own, was having heroin transactions with Eng Fong and Lam Shing (R. 778). Thereafter, he was to enlist the aid of the Chan Brothers and Jimmy Ding, all of whom were named in the indictment as co-defendants but not tried herein (R. 833).*

---

* Jimmy Ding testified for the Government.

While this activity was taking place in New York and San Francisco as part of the first shipment of drugs brought from Bangkok to the United States by Olsen, plans were being readied by Ma and Wong Shing in Bangkok [illegible] more narcotics to the United States in false-sided su[illegible]e carried by seamen aboard ships sailing to New York.

In September, Olsen returned to Bangkok bringing with him over $20,000 he had obtained from Lam from the sale of the drugs in the United States. Wong Shing took out a small share for himself and Olsen and turned the balance over to Ma -- a procedure Wong Shing testified was typical of their transactions (R. 206). Upon his arrival, Olsen discovered that Wong Shing had obtained additional false-sided suitcases as well as 30 more pounds of heroin from Ma (R. 254). Olsen and Wong Shing packed each suitcase with 7½ pounds of heroin and set out to find seamen willing to transport the suitcases to New York.

In early October, the ship Thomas Maersk, arrived in Bangkok. On board were seamen Steiner Furu and Conny Andre Gustafsson.* Olsen arranged for the seamen to deliver 15 pounds of heroin and opium to New York (R. 263). Also docked in Bangkok at this time were the ships Luna Maersk and Lica Maersk. On board the Luna was co-conspirator

---

* Furu and Gustafsson were not tried herein.

John Thomsen.* Thomsen agreed to take about 20 pounds of heroin packed in three false-sided suitcases (R. 272). Aboard the Lica was Eric Max Hansen who agreed to take about 18 pounds of heroin on to the ship. Thus, by November to December, 1971, three ships were steaming from Bangkok en route to New York where the respective seamen with the heroin were to meet either Olsen or Wong Shing as per pre-arranged plans.**

The first ship to arrive was the Thomas Maersk in November. Gustaffson and Furu were met by Olsen in New York. One suitcase containing 7½ pounds of heroin was delivered by Olsen to Lam.*** On December 25, Thomsen, aboard the Luna Maersk, arrived in New York with the first batch of many pounds of heroin he was allegedly to bring to New York (R. 1697). Olsen as per plan, met him at the waterfront and later delivered the heroin to Lam. Thereafter, additional shipments followed.

---

* John Thomsen testified for the Government.

** Olsen and Wong also made contact with a seaman named John aboard yet another ship, the Trein Maersk. John took 15 pounds of heroin on board but left the ship at Hong Kong out of fear and returned the heroin to Wong Shing there (R. 271). The opium aboard the Luna Maersk was never taken off the ship in New York. Similarly, the heroin aboard the Lica Maersk was never taken off the ship in New York. Rather it was brought back to Hong Kong and ultimately brought to New York later by the defendant Thomsen (R. 1717).

*** The other suitcase containing 7½ pounds of heroin was to be ultimately delivered to defendant Bing Hin Low in Vancouver as set forth infra in the Asia to Canada conspiracy.

The Government alleged the narcotics were distributed according to a well-defined pattern. Typically, Lam was to distribute the drugs through Jimmy Ding and the Chan Brothers to his own customers in New York. Likewise, the drugs were to be distributed in San Francisco by the appellant through his courier, Pon. In turn, the Government contended, the money received from the transactions would go from the appellant in San Francisco via his courier Pon, to Lam in New York, on to Wong Shing in Bangkok and then ultimately to Ma and his nephew (R. 2150-2151).*

Conspiracy #2 - Mainland Asia to Canada.

In November, 1971, at the time Olsen left Bangkok en route to New York City with four suitcases containing heroin, Wong Shing was leaving Bangkok by plane en route to Vancouver, Canada. The Government, in summation, was to contend, "this trip to Vancouver was the trip that opened up the Vancouver end of the whole connection ..." (R. 2145).

---

* On one occasion, the Government alleged, the appellant placed a telephone call to Wong Shing and sought to obtain drugs directly from him rather than through Lam. Wong Shing would have no part of it (R. 2152). Inasmuch as the pattern typically followed has been set out, no attempt will be made here to set forth the details of the distribution of each shipment in New York and/or San Francisco or the activities of the minor participants.

In Vancouver, Wong Shing applied for an American visa and also met with Li Chi Ying a/k/a "Robert Li" whom he had known in India. Li informed Wong Shing that he had a friend, Johnny Chou, who had a friend, Bing Hin Low a/k/a "Ah Bing" (hereinafter "Bing"), who wanted to buy 50 pounds of heroin (R. 288-289).* Wong Shing, anticipating the imminent arrival of the shipment from Bangkok being carried by Olsen, indicated that he could supply Bing with 10 pounds of heroin by Christmas (R. 290). Arrangements were made whereby Wong Shing would arrange to have the heroin delivered to Robert Li and Johnny Chau in Vancouver. In turn, they would arrange to deliver the heroin to Bing in return for which they would receive ten percent of the purchase price (R. 291-292).

In December, Olsen flew 7½ pounds of heroin (the remainder of the 15 pounds he had flown to New York as part of the first shipment) to Vancouver where he delivered it to Robert Li (R. 311).

---

* None of these individuals were tried herein although all were named as co-defendants in the indictment.

Meanwhile, in Bangkok, Wong Shing was making arrangements which would enable Bing to receive the heroin he wanted on schedule (R. 367). Ma delivered about 30 pounds to Wong Shing. At the same time, Wong Shing had received the 15 pounds from the Trein Maersk which the seaman Eric had returned (R. 371). Wong Shing and Olsen proceeded to press the heroin into false-sided suitcases each of which contained 8 pounds of heroin (R. 372). Olsen then went to the waterfront to find seamen willing to fly the heroin to Vanccuver.

Thereafter, Olsen located Arne Andersen, Steiner Furu, and Bernard Dalan all of whom were, during 1971, to fly heroin from Bangkok to Vancouver.* In Vancouver, the heroin was delivered to Bing by Robert Li via Johnny Chau and later Chau's successor Charlie Sze, who came to Vancouver to help Robert Li. Suffice it to say, that the appellant had absolutely no involvement in any of these transactions. Nor did the Government contend to the contrary.**

---

* Andersen, Furu and Dalan were not tried herein.

** In December, the appellant did call and meet Lam in Vancouver where they both met Paul Jang a/k/a "Communist Pui" who wanted to sample Lam's heroin. Lam contacted Wong Shing who brought Lam a sample. Thereafter, Jang agreed to buy 3½ pounds of heroin from Lam (R. 811-817). Some months later, Leong was to bring Jang to Lam again, not knowing that the appellant had already introduced him to Lam in Vancouver. Aside from introducing Jang to Lam in Vancouver, the appellant had no connection with Bing, Robert Li and Johnny Chau or any of their narcotics transactions in Vancouver.

ARGUMENT

POINT I

INASMUCH AS THE TRIAL PROOF INDICATED TWO DISTINCT AND INDEPENDENT CONSPIRACIES, THE ERROR OF PREJUDICIAL VARIANCE WAS COMMITTED AND A NEW TRIAL IS REQUIRED.

As previously set forth, despite the fact that the Government alleged one unified conspiracy, in actuality there were two distinct and independent conspiracies proven. The appellant, we submit, played absolutely no role in the mainland Asia to Canada conspiracy. There was not a scintilla of evidence to establish that he participated in any of the narcotics transactions involving Bing, Robert Li and Johnny Chau, who received the narcotics in Vancouver from mainland Asia. Indeed, of the defendants on trial herein, the only one who played a role in both the Asia to United States and Asia to Vancouver conspiracies was the co-defendant Olsen. Olsen had, prior to the swearing of the first witness, moved for a severance. His motion was denied. Thereafter, the appellant and co-defendants moved for a severance from Olsen, albeit for other reasons (R. 585).*

---

* See Point II, infra wherein it will be contended that the trial court erred in not granting the severance.

The record further reflects that counsel for the appellant objected most strenuously to the evidence of the Vancouver transactions upon the grounds that (a) "this evidence was totally irrelevant to this charge" and (b) that the Vancouver transaction is "a separate conspiracy that has nothing to do with this case whatsoever" (R. 2050). Despite these timely and properly-grounded objections, the trial court permitted the Government to introduce evidence concerning the Vancouver transactions. For the reasons that follow, we submit, the ruling of the trial court to permit evidence of the Vancouver transactions to reach the jury constituted reversible error.

On re-direct of Lam the Government outside the presence

At the outset, it should be recalled that out of the 25 defendants named in the indictment, the only defendants on trial herein were the appellant, Victor Leong, Ernst Olsen and Louie Yui Che. As part of its case, the Government introduced testimony from six accomplices which testimony, if believed, compellingly set forth the alleged culpability of each of the defendants in the transactions concerning the shipment of narcotics from mainland Asia to the United States -- transactions in which, according to the indictment and proof elicited at trial, they all participated in.

On the other hand, Bing, Robert Li, Tong Wong, Johnny Chau, Arne Andersen and Bernard Dalan, all of whom were alleged to have played roles in the shipment of narcotics from mainland Asia to Canada, but not from mainland Asia to the United States, were not on trial. Inasmuch as these individuals were not on trial, and inasmuch as the appellant and his co-defendants on trial were implicated by six participants and numerous other witnesses and documentary evidence in the mainland Asia to United States transactions, we submit, there was absolutely no purpose for the Government to offer evidence concerning the mainland Asia to Canada transactions in which the appellant, Leong and Louie You Chi did not participate, other than to irrevocably prejudice

The trial court further ruled that although he was permitting

the jury.*

It has long been the law of this Circuit that where, as here, convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed. Kotteakos v. United States, 328 U.S. 750 (1946); Berger v. United States, 295 U.S. 78 (1935). Since the indictment charges one overall conspiracy while the trial proof indicated at least two distinct conspriacies, the variance herein has been material. The vice, of course, is not that the jury may not have been satisfied that each of the asserted transactions in the indictment took place, but rather, that there was a singular lack of evidence linking the Asia to Canada transactions together with the Asia to United States transactions into one single overall conspiracy.

---

* Under the Government's theory as set forth in the indictment, Ma, Tony Ma and Anake were the "sources of supply"; Wong Shing was the "controller"; Olsen, Gustafsson, Furu, Hansen, Christiansen, Andersen and Dalan together with co-conspirator Thomsen were "the smugglers"; Lam, Charley Sze and Robert Li were "the North American Receivers"; Bing, Tony Wong, Paul Jang, Lee Louie and the appellant were "the North American Distributors"; Johnny Chau, co-conspirator Jimmy Pang, Chan Yuk Wo, Chan Yuk Shui, Chow Wai Hing, Ding Sze Yin and Low Bok Mon were "the workers"; and Leong, Pon, George Kay Lew, Chan Cheung, Eng Fong, Lam Shing, Wee Sik Moy, Bill Fern, Philip Choy Tong, Roland Chu, Luie Yui Che were "the buyers" (A. 12-29).

(R. 1643-1647). Counsel was thus probing Law's state of

In United States v. Bertolotti et al., ___ F. 2d ___, slip op. #6409 et. sec., November 10, 1975, this Court definitively enunciated the law of this Circuit concerning the joinder of alleged criminal acts, loosely if at all connected, into an alleged single conspiracy. In reversing the convictions therein, and ordering a retrial, this Court specifically noted that despite the admonition to the Government in United States v. Sperling, 506 F. 2d 1323 (2nd Cir., 1974) cert. den., 420 U.S. 962 (1975), that it cease combining separate, unrelated conspiracies, the Government nevertheless, continued its pattern of impermissible and grossly prejudicial joinder. Here, too, we submit, the Government, despite being clearly placed on notice, chose to disregard the sage admonition in Sperling. We, therefore, urge reversal. In the instant case, as in Bertolotti,

> "Under the guise of its single conspiracy theory, the Government subjected . . . the appellant to voluminous testimony relating to unconnected crimes in which he took no part."
> (p. 6423.)

Merely a cursory look at the indictment and an analysis of the evidence at trial insofar as it pertains to the Vancouver transactions, indicates the extent and depth of the prejudice to the appellant. Overt acts 41, 44, 53, 56, 66, 68 and 72 concern themselves exclusively with the Vancouver transactions. These overt acts charge, in substance, that approximately 42,000 grams of heroin, well in excess of 90 pounds of heroin, were delivered from mainland Asia to Canada. The evidence concerning these transactions was laboriously presented to the jury as was the fact that many thousands of dollars were being sent from Vancouver to mainland Asia. In summation, the Government stressed these inflamatory factors to the jury (A. 2155-2159). The inherent prejudice of these unrelated criminal transactions when related to the transactions in which the appellant allegedly participated and their "spill over" effect upon the appellant was truly great when weighed against the ability of the jury to give the appellant the individual consideration that our system of justice requires. Bertolotti, p. 6424.

Given the inherently prejudicial "spill over" effect of the evidence of the Vancouver transactions in which the appellant played no part and which were, in law and in fact a distinct and independent conspiracy from the mainland Asia to United States conspiracy, it may not be said that the

As set forth in Weinstein's Evidence:

improper joinder of the separate conspiracies had no influence on the jury's verdict or that such error was "harmless". We submit, therefore, the judgment of conviction should be reversed and a new trial ordered.

POINT II

THE TRIAL COURT ERRED BY NOT GRANTING APPELLANT'S MOTIONS FOR A SEVERANCE AND MISTRIAL.

At the very outset of the trial, the following colloquy occurred between counsel for the co-defendant Ernst Olsen and the trial court:

> "MR. KATCHER: On behalf of my client, you will recall I served on the district attorney and upon yourself several months ago a motion to dismiss the current indictment on the basis this indictment involves the question of double jeopardy.
>
> THE COURT: As well as collateral estoppel.
>
> MR. KATCHER: Right.
>
> And in view of the fact your Honor has not yet ruled upon that motion I think your Honor indicated unofficially that you will wait and see what develops during the course of the trial before your Honor will pass judgment one way or another upon the merits of my application.
>
> But for the purpose of the record I must at this time, your Honor, ask your Honor, in view of the fact your Honor has not as of this moment decided that motion which we are all well aware of, I respectfully suggest that the case on trial which involves my client, Mr. Olsen, be severed to such time as that motion which is now pending before you undetermined is determined, because to place him on trial at this point in time without judgment having been exercised as to the merits of the application we are again subjecting him, assuming for the moment that the application is meritorious, to unnecessary and harsh treatment under our Constitution.

I must protect the record by making this motion, as I indicated to your Honor.

THE COURT: Number one, the original motion to which you had reference, which bears the Court's file stamp of July 10th, is before the Court now. I deem the motion to have been made timely, to have been renewed now, and relative to the motion I will adhere to my original determination to reserve decision on it.

Relative to your motion for severance, I believe that that matter does lie in my discretion, and taking all of the circumstances into account -- and I now have a fair background relative to this case -- I, within the exercise of my discretion, do not find that Mr. Olsen would be prejudiced by going to trial on this indictment at this time, with the one safeguard being that I certainly will, as the evidence here develops, consider the matter of alleged double jeopardy or collateral estoppel.

Accordingly, having noted that the double jeopardy-collateral estoppel motion is pending, I will at this time deny the motion for a severance.

MR. KATCHER: Exception, for the purposes of the record."

The severance motion having been denied, throughout his cross-examination of the first Government witness, Wong Shing, counsel for the co-defendant Olsen attempted to lay a basis in fact for his "double jeopardy motion". (R. 583-584).* During the course of his cross-examination he posed the following question:

---

* The co-defendant Olsen had previously been tried for violating the narcotics laws in the United States District Court, Eastern District of New York (R. 469, 572).

"Did you make a sale of narcotics on more than one occasion to a person by the name of Lee in Chinatown in the company of Lam?" (R. 582)

The Government objected and stated:

"This is outside the scope of direct, outside the scope of the indictment. I think if Mr. Katcher would establish a date, it would become clear it is outside the scope of this case." (R. 582)

Counsel for the co-defendant Olsen then responded in the presence of the jury:

"The relevancy of my question, if it does not relate to the th ee indictments, I will ask it be stricken." (R. 582)

Thereafter the following colloquy occurred at the side bar outside the presence of the jury:

"MR. KAUFMAN: Your Honor, I've been sitting here patiently all afternoon with the suspicion of what Mr. Katcher was doing was trying t. lay some sort of record for his double jeopardy motion, trying to show this case is the same as the other cases.

Number one, it is the Government's position it is not an issue for the jury but for your Honor to decide. I think Mr. Katcher, whether consciously or unconsciously, admitted that when he said it relates to the three indictments.

Mr. Katcher is trying to elicit testimony about all the witness' deals from '67 to '72. That is not the purpose of this trial. That is not the correct purpose of defense to try --

THE COURT: It doesn't seem to me that it is a question for the jury. The double jeopardy is only a question for the Court. I think what I have to do to answer it is to determine what the transactions here consist of and then match them against the transactions in the other case or cases.

MR. KATCHER: If you want to take his testimony without the presence of the jury to show one continuing conspiracy from '68 to the end of '72, I will be more than glad to do that.

MR. KAUFMAN: Your Honor, I don't think we should do it in the middle of the trial.

MR. KATCHER: While it is true it is not within the province of the jury to hear this, there is no other way of establishing it.

THE COURT: The only problem is, it also becomes prejudicial to the co-defendants in that range afield. Once you do that, the Government has every right in the world to come back on cross-examination. We are sitting here with an indictment which starts on or about the 1st day of May 1971, and goes subsequent to that.

MR. KATCHER: To date.

THE COURT: To date is correct.

You have, in prior questions, and you have just done it again, you have been eliciting or attempting to elicit answers relative to a history that goes back to 1968, for example, when he met your client and it does appear true that the purpose of your doing it is to establish a record for your double jeopardy motion.

But the problem that I see, among other things, unless your co-defendants choose not to object, and if they choose not to object I may let you do it, but it would seem to me, and it is up to me as well as protecting the rights of your client to also protect thr rights of the three co-defendants, and by bringing this in now, if I let it go in, you would permit the Government all sorts of latitude.

Up to this moment, your co-defendants' counsel have remained silent, but I must suggest that the jeopardy that may attach may be more to their clients than to yourself.

MR. KATCHER: They are not involved in the two indictments, your Honor.

MR. SINGER: Your Honor, with respect to that, on behalf of Wong Chou Shek I would at this time move for a severance of this case from Mr. Olsen.

I believe that the information coming in now is prejudicial to my client, Wong Chou Shek, and that in the event that a motion is granted with respect to Mr. Olsen and his double jeopardy motion, I will then move for a mistrial on the basis of this information that is coming now, is improperly joined, and my client has nothing to do with this information.

THE COURT: This had nothing to do with the Government. If the Government had done this, I would say I would be listening very carefully, but when your co-counsel has elicited this information, It's the Government who stepped up here just now and asked for a side bar and is pointing out the serious problems which could arise by a continued examination in this area.

I do believe, Mr. Katcher, that it is not necessary for you and not appropriate for you to get into these other indictments in front of this jury.

I repeat: I feel that the obligation which I have is to review the record in this case and then match it up against any other record to determine whether there is a matchup, and if there is, your motion would properly lie, and if there isn't it should properly be denied. But I don't think you do it by proving the other cases as well, or at least retrying the other cases before this jury.

MR. KATCHER: Only the one case I referred to, your Honor.

THE COURT: Yes, but you have spent a fair amount of time on that.

MR. KATCHER: The same persons were mentioned, the two Louies and Bill Fern. Another one was mentioned in the indictment --

MR. KAUFMAN: Your Honor, this is simply not a jury issue.

THE COURT: If you wish to inquire relative to anything contained within the four corners of this indictment, you have every right to do so, but it seems to me by going afield, as you seem to be doing at this point, you are laying your co-defendants open to serious problems themselves.

Mr. Singer has just interposed an objection. He seeks at this point a severance. If the conduct had been that of the Government, I might say there would be a serious problem, but since you have chosen to proceed in this way, I am going to indicate to him that his motion will be denied, and I would suggest that you might want to rethink the degree in which you want to inquire further, because I think it is inappropriate and I am prepared to rule the subject matter that you wish to go into is not relevant here.

MR. SINGER: Your Honor, with respect to that indication, that this is not the Government who is opening the door here, if it should be found that the area of inquiry is appropriate because of the Government's so-called foundation evidence which they elicited on direct examination, then I do feel that it would have been the Government who had opened the door in this line of inquiry.

In addition to that, I don't think a motion for severance with respect to Wong Chou Shek turns directly on whether or not the Government or a co-defendant opens the door. If it is improper for the co-defendant to open the door, so to speak, then I would be entitled to the same severance, I believe, whether the defendant or the Government.

THE COURT: I would suggest it would become very easy for cases to result in splintering and mistrials merely by the conduct of counsel, and that's why I would suggest most strongly that if the conduct were on the part of the prosecutor, I would be seriously troubled.

> Here your co-counsel has chosen to try his case in a certain way, and you have sat silently by, presumably hoping to derive some benefit from his rather extensive cross-examination. It was only the Government which stepped forward in an attempt to stop this.
>
> But I am going to suggest this: At the moment, Mr. Katcher, I have indicated my views. If you want to ask your next question, you can ask it, and as far as the motion made by you, Mr. Singer, for a severance, a severance for mistrial, that motion is in all respects denied."
> (R. 583-588)*

We submit, that in denying the motion of the appellant's trial counsel for a severance and/or a mistrial, the Court below committed reversible error. (Rule 16, F.R.C.P.).

Counsel for co-defendant Olsen's comment in the presence of the jury about "three indictments" -- even if made inadvertently -- imbued this trial with such a fatal degree of taint which no curative instructions could cure. This was not merely a comment about "three proceedings" or some such other innocuous statement. Nor did it merely indicate that co-defendant Olsen was the subject of the "three indictments".

---

* Thereafter, the trial court, over objection of counsel for co-defendant Olsen, gave the jury "cautionary instructions" in which he stated that "the reference to three indictments (was) an inadvertent slip of the tongue by Mr. Katcher" (R. 594). The following day, after an extensive colloquy, the attorney for the co-defendant Olsen renewed his motion for a severance from the other defendants. When that was denied, he moved for a mistrial which motion was also denied (R. 59[illegible]-60[illegible]).

That would have been prejudicial enough! Rather, the clear -- and indeed the only -- fair inference for the jury to draw was that besides the instant indictment for which they were being tried, there were two additional indictments charging the appellant and his co-defendants with crimes. Moreover, in light of the questions proceeding counsel's fatal blunder, the jury could only assume that the two other indictments related to narcotics.

Additionally, it should be recalled that counsel's "three indictment" comment was not made out of the blue. Inasmuch as the trial court indicated in denying Olsen's motion for a severance at the outset of the case that "I certainly will, as the evidence here developes, consider the matter of alleged double jeopardy or collateral estoppel" it was patently forseeable that the co-defendants on trial with Olsen would be irreparably prejudiced in the absence of a severance from Olsen. Indeed, as the Government, itself, aptly observed, notwithstanding the fact that the question of "double joepardy" was one of law for the judge to determine and not one of fact for the jury, throughout his entire cross-examination of Wong Shing which apparently took all afternoon, counsel for co-defendant Olsen as per his previously-expressed intention, sought to elicit testimony about the witness'

dealings from 1967-1972, in support of his client's pending "double jeopardy motion". This despite the fact that such dealings concededly bore no relevance to the indictment for which the appellant was being tried (R. 583-585).*

Given the magnitude of the prejudice to the appellant by counsel for the co-defendant Olsen's unfortunate trial tactics culminating in his devastating "three indictment" comment, we submit, the "curative instructions" of the trial court became meaningless.

In Delli Paoli v. United States, 352 U.S. 232 (1956), Justice Frankfurter, speaking for the dissenters** stated as follows:

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds" (pp. 247-48, citations omitted).

---

* Over objection, counsel for the defendant Olsen followed the same tack in cross-examining Government witness Lam, thereby encumbering the record with evidence which concededly bore no relevance to the indictment being tried. (R. 1004-1007).

** In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court overruled its own holding in Delli Paoli and specifically stated it was adopting the reasoning of the dissenters therein (p. 129).

To the same effect, is the statement of Justice Jackson in his concurring opinion in Krulewitch v. United States, 336 U.S. 440 (1948):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction" (p. 453).

POINT III

THE TRIAL COURT ERRED IN ADMITTING GOVERNMENT'S EXHIBIT 44 INTO EVIDENCE.

On direct-examination, the witness Lam, testified that he had signed a written agreement with the Government setting forth what the Government would do for Lam in return for his cooperation. After laying a foundation, the Government, marked the written agreement for identification as GX 40 and offered it in evidence. Counsel for the defendants objected and the document was not admitted. (R. 722-727, 1190-1191).

During cross-examination of the witness Lam, the defense elicited that he had been threatened by the Government prosecutors (R. 881). More particularly, Lam testified that Assistant United States Attorneys Kaufman and Bannigan told him that if he did not want to be a witness "then (he) will have to serve from one day to life sentence". (R. 884-885, 1070-1073). Additionally, the defense probed with regard to the other promises in the written agreement between Lam and the Government (R. 1105-1106).

On re-direct of Lam the Government, outside the presence of the jury, indicated that it was their intention to offer the agreement into evidence upon the grounds (a) that trial counsel for the appellant had opened the door by his cross-examination of Lam and (b) because the agreement would show that the Government, through its prosecutors, did not make Lam "improper inducements to testify" (R. 1121). Counsel for all defendants objected. The trial court indicated at that time, and at a subsequent colloquy, that he wished to review the transcript to see how far the "door was opened" and informed the Government that in the event they offered the disputed document he would, at that juncture, sustain the objection. The trial court further directed that in the interim, the Government produce a redacted agreement which counsel could stipulate to in the event the trial court found the document should be admitted into evidence (R. 1116-1125, 1190-1206).*

Ultimately, over strenuous objection by counsel for each defendant, the trial court ruled that (a) counsel for the defense had, on cross-examination of the witness, Lam, opened the door and (b) that the agreement came within the exception to the hearsay rule under Rule 803(5) of the Federal Rules of Evidence so as to be admissible in evidence (R. 1205, 1647).

---

* For example, paragraph 6 of GX 40 for identification indicated that Lam had testified "against major narcotics violators who could pose a threat to his life". (A. 30-32).

The trial court further ruled that although he was permitting GX 40 for identification to be admitted into evidence, he would only allow a redacted version to be read to the jury and would thereafter give cautionary instructions (R. 1642-1659). Pursuant to the ruling of the trial court, the redacted agreement was received in evidence as GX 44 (R. 1662-1663; A. 33-34).

We submit, the trial court erred by permitting even a redacted version of GX 40 for identification to be read into evidence.

In the first place, it was the Government, in its direct-examination of Lam, which made the initial reference to GX 40 for identification (R. 724-727). Nor did the Government merely mention, in passing, the "agreement". Instead, it posed approximately 7 questions concerning the document, before it offered it. Moreover, on cross-examination of Lam by trial counsel for the appellant, the witness Lam, himself, brought up the subject of the "contract" even though counsel was not inquiring about it (R. 1105). Finally, the questions posed by the trial counsel for the appellant about the "agreement" were concerned with the date at which it was signed -- a matter the Government itself had brought out on direct-examination (R. 1106, 725). Moreover, these questions were posed not with regard to the elements of the contract but rather "in the context of whether or not in his mind he, (the witness Lam), believed those things were going to happen".

(R. 1643-1647). Counsel was thus probing Lam's state of mind -- a classically proper technique of cross-examination, and was not inquiring into the terms of the contract itself "so as to open the door". While counsel's inquiries may have been searching, in light of the direct-examination of Lam, they did not open the door.

In any event, GX 44 was gross hearsay and did not fall within the exception to the hearsay rule as set forth in Rule 803(5) of the Federal Rules of Criminal Procedure. Thus, the contents of GX 44 should not have been permitted to reach the jury without the defense being given the opportunity to cross-examine Lam on the matters contained therein.

Rule 803(5) of the Federal Rules of Evidence states as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (5) Recorded recollection. -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

During the discussions as to whether GX 40 for identification should be admitted into evidence, the trial court made the following observations:

> "THE COURT: You agree that this document is hearsay in the first instance, do you not?
>
> MR. KAUFMAN: Technically it is offered to prove the truth of the matter asserted therein, but the witness who signed it is available for cross-examination.
>
> THE COURT: I am troubled. I said to you before that I don't consider it a record of regularly conducted activity. Therefore, I am inclined to turn back to the next section of Rule 803, which would be a recorded recollection.
>
> It is interesting to note that 803(5) says:
>
> 'A memorandum or a record concerning a matter about which a witness once acknowledged but now had insufficient recollection to enable him to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly if admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.'
>
> So the offer here is not made by the adverse party, which in my judgment would be one of the defendants, and if I take the matter, wouldn't I be taking it under 803(5), and therefore it would not be received, but it could, however, be read. What about that?
>
> MR. KAUFMAN: The Government would have no objection to proceeding that way, reading it to the jury rather than offering it as an exhibit.
>
> THE COURT: You are going to have to show me that in his testimony he had insufficient recollection to enable him to testify fully and accurately." (R. 1203-1204).

As set forth in Weinstein's Evidence:

> "Rule 803(5) adopts the view that a memorandum of recorded recollection is hearsay, but eligible for admission if certain conditions are met.
>
> Two theories have been advanced to justify admission of recorded recollection despite the hearsay rule: (1) That use of the memorandum is necessary because the witness is unavailable as a result of his lack of memory of the event in question and (2) that a contemporary, accurate record is inherently superior to a present recollection subject to the fallibility of human memory."
> (Vol. 4, 803-130).

On the instant record, there was absolutely no showing that the use of the GX 44 was necessary because Lam was unavailable as a result of his lack of memory of the events in question. Lam had not been "vague", "evasive" and was not "suffering from convenient lapses of memory". (c.f.) United States v. Barrow, 363 F. 2d 62, 66-67 (3rd Cir., 1966), cert den. 385 U.S. 1001 (1967). Simply put, as the defense aptly noted, this was not a case requiring application of "past recollection recorded" as embodied in Rule 803(5) of the Federal Rules of Evidence (A. 1650-1651). It was thus error to admit into evidence even a redacted version of the disputed document. The compelling effect of allowing the document to come into evidence, was to nullify the cross-examination of the defense into the veracity of the witness Lam. The trial court's misapplication of Rule 803(5) therefore constituted reversible error.

POINT IV

THE APPELLANT, WONG CHOU SHEK, RESPECTFULLY ADOPTS ALL POINTS ADVANCED BY HIS CO-APPELLANTS INSOFAR AS THESE POINTS ARE APPLICABLE TO HIM.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

GASTHALTER & POLLOK
Attorneys for the Appellant
WONG CHOU SHEK
233 Broadway
New York, New York 10007
(212) 964-6226

EDWARD GASTHALTER,

Of counsel